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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN ZELLERBACH CORPORATION,
Petitioner,

v.

ARTHUR N. ARONSEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does an employee's belief that his employer may reconsider its announced decision to terminate him postpone the running of the 300-day filing period of the Age Discrimination in Employment Act of 1967? If so, how can that result be reconciled with this Court's decision in *Delaware State College* v. *Ricks*, which held that an employee's reasonable belief that an employer may reverse an adverse employment decision did not postpone the deadline for filing a charge of discrimination?

2. In an action brought under the Age Discrimination in Employment Act of 1967 by an employee who failed to file on time his notice of intent to sue, is the employer equitably estopped from raising the defense of untimeliness merely because it paid the employee severance benefits after notifying him of the decision to terminate him? If so, how can that result be reconciled with this Court's decisions in *Ricks* and *Chardon* v. *Fernandez*, both of which held that the continued employment of an employee after he is notified of an adverse employment decision (denial of tenure in *Ricks* and termination of employment in *Chardon*) could not extend the time for filing charges of discrimination?

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OPINIONS OF THE COURTS BELOW

This petition for writ of certiorari seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in *Aronsen* v. *Crown Zellerbach,* 662 F.2d 584 (9th 1981), as amended by an unpublished order dated June 2, 1982. Copies of the court of appeals' opinion and amending order are attached to this petition as appendices A and B respectively.

The court of appeals reversed the judgment of the United States District Court for the Northern District of California granting the motion of petitioner to dismiss respondent's complaint. A copy of the opinion of the district court, reported as *Aronsen* v. *Crown Zellerbach,* 15 Emp. Prac. Dec. (CCH) ¶ 8076 (N.D. Cal. 1978), is attached to this petition as appendix C.

BASIS FOR JURISDICTION OF THIS COURT

The judgment of the court of appeals is dated November 23, 1981, and was entered on that date. By order dated June 21, 1982, the court of appeals denied the petition for rehearing and rejected the suggestion for rehearing *en banc.* This order is attached to the petition as appendix D.

Jurisdiction over the petition, filed with this Court on September 20, 1982, exists pursuant to sections 1254(1) and 2101(c) of title 28 of the United States Code.

LISTING OF PETITIONER'S PARENT COMPANIES, NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

Petitioner Crown Zellerbach Corporation does not have any parent companies. Its non-wholly owned subsidiaries and affiliates are Crown Simpson Corporation, Crown Zellerbach Canada Limited, Crown Simpson Pulp Company, Procesadora

Industrial de Moderna, S.A. de C.V., Grupo Mapel, S.A. de C.V., Fabrica de Papel San Francisco, S.A. de C.V., Rachali de Chihuahua, S.A., Puertas Tarahumares, S.A. de C.V., Grupo Forestal Industrial, S.A. de C.V., Empaques Flexibles, S.A., Sigma, S.A., Q Corp., and Bufkor, Inc.

APPLICABLE STATUTE

29 U.S.C. § (1976):

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which Section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

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Petition for Writ of Certiorari

INTRODUCTION

Two terms ago, this Court held that the time for bringing charges of employment discrimination under Title VII and 42 U.S.C. § 1981 begins to run when the employee is informed of the allegedly unlawful employment decision. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). This Court specifically held that the filing period is not extended even though the employee reasonably believes that the employer may change its decision, or because the employee continues to work for the employer after the adverse decision is announced.

Last term, in a *per curiam* decision, this Court held that the principle of *Ricks*, which involved denial of tenure to a college instructor, is equally applicable to an employee challenging his termination under 42 U.S.C. § 1983. *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). This Court believed that *Ricks* so clearly governed the issues in *Chardon* that it found plenary review of the matter unnecessary and reversed the lower court on the basis of the certiorari papers alone.

In this case, a panel of the United States Court of Appeals for the Ninth Circuit refused to follow *Ricks* and *Chardon*. Even though there is no doubt that the rulings in those cases apply equally to an action brought under the Age Discrimination in Employment Act of 1967, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), and even though the panel's opinion acknowledged the applicability of *Ricks* to an ADEA action, the court of appeals disregarded this Court's teaching. It held that the time for filing a notice of intent to sue under the ADEA did not begin to run when the employee was told unequivocally that he was being terminated, was relieved of all job responsibilities, and received severance benefits. Instead, the court of appeals held that if the employee hoped that the employer might change its mind about the termination, the limitations period did not commence upon notice. The court of appeals also held that the employer's mere payment of severance benefits could constitute equitable estoppel, and preclude the employer from raising as a defense the untimeliness of the employee's notice of intent to sue.

A writ of certiorari should be granted because the court of appeals has wholly disregarded *Ricks* and *Chardon*, and its ruling in this matter directly conflicts with those decisions.

STATEMENT OF THE CASE

Respondent Arthur N. Aronsen ("Aronsen") brought this action against petitioner Crown Zellerbach Corporation ("Crown") in the United States District Court for the Northern

District of California under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976) (the "ADEA"). Aronsen alleged that Crown had unlawfully terminated him because of his age. C.R. 2.[1]

The undisputed facts in the record show that Crown informed Aronsen not later than March 31, 1975, that it had decided to terminate his employment. C.R. 63, 104-06, 169. Aronsen was relieved of all employment responsibilities at the time he was informed of his termination. C.R. 63, 109. Thereafter, however, Crown provided Aronsen with numerous severance benefits, including payments equal to his former salary for a period of one year and reimbursement of expenses he incurred while seeking other employment. C.R. 63. Aronsen spent the following year looking for employment elsewhere and working for other employers. C.R. 63, 64, 119-25, 127-34, 149. During that year he received more than $70,000 worth of severance benefits from Crown and, while working for others, earned or was promised fees ranging from $35 per hour to $500 per day and totaling $22,000 from one employer and $26,000 from another. C.R. 63, 113-16, 121, 133.

Aronsen filed no claim of discrimination until January 1977, when he filed a notice of intent to sue under the ADEA with the Secretary of Labor. C.R. 58-61. He later commenced this action in the district court pursuant to 29 U.S.C. § 626(c).

Crown moved to dismiss Aronsen's complaint on the ground that he had not complied with section 7(d)(2) of the ADEA, 29 U.S.C. § 626(d)(2) (1976), which required him to file a notice of intent to sue not later than 300 days after the alleged unlawful practice occurred. Relying upon the affidavit of Ernest A. Mitchell, the Crown executive who had informed Aronsen of his termination, and Aronsen's own deposition testimony concerning his discussions with Mitchell, Crown asserted that Aronsen's time for filing his administrative charge began to run not later than March 31, 1975.

After allowing Aronsen a full opportunity to present evidence concerning the time he was notified of his termination,

[1] Citations are to the record before the court of appeals.

the district court held that it was undisputed that Aronsen had received notice of his termination by March 31, 1975. The district court further held that the time within which Aronsen was required to file notice of intent to sue began to run on that date. Because Aronsen did not file his notice of intent to sue until nearly two years later, one year beyond the 300-day period permitted by the ADEA, the district court dismissed the complaint as untimely.

Aronsen appealed the district court's judgment. He did not deny that he had been notified of Crown's decision to terminate him as early as March 31, 1975, but argued that the date in mid-1976 when he stopped receiving severance benefits from Crown should be used in determining the timeliness of his notice of intent to sue.

After the court of appeals took the matter under submission, this Court decided *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Because *Ricks* addressed the same issue pending before the Ninth Circuit, Crown immediately drew the court of appeals' attention to the decision. The panel requested and received further briefing from the parties on *Ricks*'s applicability to this action.

The court of appeals then issued its decision reversing the district court's judgment. Appendix A. Although acknowledging the applicability of *Ricks* to this case, 662 F.2d at 592, the Ninth Circuit held that summary judgment should not have been granted in Crown's favor because the record did not establish that Aronsen knew he was being terminated and that his termination was unlawful:

> Although [Crown] contends that Aronsen was informally informed of his termination by March 31, 1975, Aronsen disputes this. The trial record reveals Aronsen's *argument* that he was not specifically informed before March 31, 1975, of his termination. Under these circumstances, a factual dispute exists on the issue whether Aronsen knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice.

662 F.2d at 594. (Emphasis supplied.)

The Ninth Circuit also indicated that "[o]n remand, the issue of equitable tolling *may arise.*" *Id.* at 595. (Emphasis supplied.) Noting Crown's payment of severance benefits to Aronsen and speculating that Aronsen might have feared that they would be discontinued if he filed a charge of discrimination against Crown, the court of appeals suggested that Aronsen could invoke equitable modification of the limitations period if he alleged and were able to establish certain facts. The court of appeals acknowledged that the issue of equitable tolling had not been raised by Aronsen on appeal, but justified its reliance on the doctrine to reverse the district court on the ground that it was a question of law connected with "the contested notice date issue," and therefore did not "prejudice" Crown. *Id.* n.20.

Crown immediately petitioned the court of appeals for rehearing because the panel had misconstrued the record. The court of appeals had based its ruling on facts not present in the record and on issues not raised before the district court or on appeal. Aronsen had never denied that he had been informed by March 31, 1975, of his termination; instead, he had freely admitted receiving notice of termination by that date. C.R. 104-06, 169. Nor had Aronsen contended that he was unaware of the law against age discrimination in employment. To the contrary, the handwritten notes which he submitted in opposition to Crown's motion to dismiss his complaint contained an entry made more than 300 days before he filed notice of intent to sue in which he expressed the belief that he was the victim of age discrimination. C.R. 156. Finally, Aronsen had never argued that his filing period should be equitably modified. Indeed, he focused solely on the issue of when the limitations period began to run. Aronsen conceded that if the period began to run when he was notified of the decision to terminate him, the notice of intent to sue was untimely.

These undisputed facts were brought to the Ninth Circuit's attention in Crown's petition for rehearing. In addition, Crown noted this Court's recent decision in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), in which the principle of *Ricks* was applied to

the claims of discharged employees. Crown asserted that *Ricks* and *Chardon* compelled the court of appeals to affirm the decision of the district court.

The Ninth Circuit panel declined to reverse its decision, however. Instead, it issued a three-page "Order Amending Opinion" which deleted various passages in the original opinion and substituted new language for some of them. Appendix B.

In its amended opinion, the Ninth Circuit acknowledged that there was no dispute in the record that Aronsen knew by March 31, 1975, that he was being terminated. It also dropped its suggestion that Aronsen had to be aware that his termination was unlawful in order for the limitations period to commence. Having corrected these errors, the panel justified its reversal of the district court on the new ground that summary judgment was improper because there was evidence Aronsen believed that Crown might reconsider its decision to terminate him.

> The record does establish that Aronsen was informed as early as March of 1975 that Crown planned to terminate him. Without more this would seem to entitle Crown to summary judgment. The record also reveals, however, that Aronsen believed that Crown might reconsider its decision to terminate him. Whether this belief was reasonable is not a matter that can be determined on summary judgment.

Order Amending Opinion at 2.

The court of appeals also modified its discussion of equitable tolling. The panel deleted its original language which had suggested that the issue of equitable tolling "may arise" on remand. The revised opinion asserted that Aronsen's alleged belief that Crown might reconsider its decision, in and of itself, "raises the issue of equitable modification." *Id.* at 3.

The Order Amending Opinion contained no discussion of legal authorities. It made no effort to reconcile its result with *Ricks* and *Chardon*.

REASONS FOR GRANTING THE WRIT

1. Under this Court's Decisions in *Delaware State College* v. *Ricks* and *Chardon* v. *Fernandez*, the Time in Which to File a Notice of Intent to Sue Commences When the Employee Is Told of the Decision to Terminate Him.

Twice in the last two terms, this Court addressed the issue of when the filing limitations periods under the various civil rights statutes begin to run. Each time, this Court declared that those filing periods begin to run as soon as an adverse employment decision is made and announced to the employee.

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the plaintiff, a black Liberian who worked as a college instructor, claimed that a decision to deny him tenure violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The plaintiff was informed in 1974 that the college had decided to deny him tenure but that he would be permitted to continue to teach under a "terminal" contract which would expire the next year. Because he had filed an internal college grievance concerning the college's decision, the plaintiff was also informed that if the college's educational policy committee and board of trustees decided that tenure should be granted, the decisions of those bodies would supercede the previous decision. 449 U.S. at 252-53 & n.2.

The grievance was ultimately denied, and the plaintiff subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission and commenced a suit in federal court under Title VII and 42 U.S.C. § 1981. Measured from the date the plaintiff had ceased employment with the college under the one-year "terminal" contract, the suit was timely, but measured from the date he had been told of the denial of tenure, the suit was time-barred. Concluding that the latter date governed, the trial court dismissed the suit.

The Third Circuit Court of Appeals reversed. That court held that because of public policy, the limitations period for an employee to file charges of discrimination should not run while he continues to work for the employer.

This Court directed the Third Circuit to reinstate the district court's order dismissing the complaint. This Court declared that the applicable filing periods began to run when the college informed the plaintiff of its allegedly unlawful decision to deny him tenure, and not when he actually stopped working as an instructor.

This Court concluded that the fact that an employee continues to work for the employer does not suspend the limitations period: "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." 449 U.S. at 257.

In addition, this Court held that the pendency of the grievance procedure during which the college undertook to review its initial decision did not toll the running of the limitations periods.[2] "[T]he pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." 449 U.S. at 261.

In *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), in a *per curiam* opinion rendered on the basis of the certiorari papers alone, this Court applied the rule announced in *Ricks* to a case involving termination of employment allegedly in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. In *Chardon*, the plaintiffs were given advance warnings that they would be terminated from employment at certain dates in the future. After they were discharged, they commenced actions in federal court claiming that their terminations violated the civil rights statute. Measuring the timeliness of the suit from the dates that notices of the termination decisions were given, the district court dismissed the complaints as time-barred.

[2] The contrary view was argued by the United States Equal Employment Opportunity Commission in its *amicus curiae* brief.

The First Circuit Court of Appeals reversed. It distinguished *Ricks* on the ground that the plaintiff in that case had alleged unlawful denial of tenure, while the plaintiffs in *Chardon* had alleged the termination of their employment as the "unlawful employment practice."

This Court summarily reversed the court of appeals. It declared:

> In *Ricks,* we held that the proper focus is on the time of the *discriminatory act,* not the point at which the *consequences* of the act become painful. . . . The fact of termination is not itself an illegal act. In *Ricks,* the alleged illegal act was racial discrimination in the tenure decision. . . . Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. . . . The fact that [the plaintiffs] were afforded reasonable notice cannot extend the period in which suit must be filed.

454 U.S. at 8. (Emphasis in original, citations omitted.)

Thus, *Ricks* and *Chardon* establish a clear rule for determining timeliness in suits challenging allegedly unlawful employment terminations: The limitations period begins to run once the allegedly unlawful decision to terminate has been made and communicated to the employee. Neither the possibility that the employer may reconsider its decision, nor the continued receipt of employment benefits tolls the running of the filing period.

2. The Ninth Circuit's Holding that Aronsen's Filing Period Did Not Begin to Run Because He Hoped that Crown Might Reconsider Its Decision Violates the Rule Established by *Ricks* and *Chardon.*

In its revised opinion, the Ninth Circuit's first ground for reversing the trial court was stated as follows:

> The record does establish that Aronsen was informed as early as March of 1975 that Crown planned to terminate

> him. Without more this would seem to entitle Crown to summary judgment. *The record also reveals, however, that Aronsen believed that Crown might reconsider its decision to terminate him.* Whether this belief was reasonable is not a matter that can be determined on summary judgment.

Order Amending Opinion at 2. (Emphasis supplied.)

This ground for decision is clearly precluded by *Ricks* and *Chardon*. In *Ricks*, the plaintiff was expressly told that by virtue of the grievance proceeding, the employer was in fact reconsidering the denial of tenure and that it might reverse the decision. Certainly the plaintiff in *Ricks* had every reason to believe that the decision might be reversed. Nevertheless, this Court held that a possiblity of reconsideration, even when formalized through a grievance procedure, does not suspend the limitations period.

In this case, the only alleged fact concerning reconsideration is Aronsen's self-serving declaration that he thought it was "possible" that Crown would reconsider. C.R. 151. If an employer-generated belief in reconsideration has no effect on the timeliness of a charge of discrimination, *a fortiori* an employee-generated belief that reconsideration is possible also cannot suspend the limitations period.

Because the panel's decision in this case cannot in any way be squared with *Ricks* and *Chardon*, it must be reversed.

3. The Ninth Circuit's Holding that the Mere Payment of Severance Benefits Can Result in Equitable Modification of the Limitations Period Violates the Rule Established by *Ricks* and *Chardon*.

The Ninth Circuit also held that Crown could be estopped from raising the untimeliness of Aronsen's notice of intent to sue merely because it paid him severance benefits after informing him of its decision to terminate him. According to the court of appeals, the payment of post-termination benefits could give rise to an equitable estoppel because it might have led Aronsen to believe that Crown would reconsider its decision to terminate him, and because Aronsen might have feared that the benefits would be ended if he brought charges of discrimination against the company.

The panel's holding directly contradicts the rule of *Ricks* and *Chardon*. In both cases, the plaintiffs continued to be employed *after* they were informed of the adverse decision, yet this Court expressly held that their continued employment had no bearing on the issue of timeliness. If the possibility of equitable tolling merely because of continued receipt of employment benefits precludes the dismissal of a complaint on timeliness grounds, then this Court would not have sustained the dismissal of the complaints in *Ricks* and *Chardon*.

Indeed, *Ricks* and *Chardon* presented more likely grounds for tolling since the plaintiffs in those cases continued active employment. In that setting an employee may well hope for reconsideration. Where, as here, the employee is relieved of his duties, the termination becomes final.

In addition, the court of appeals' ruling rests on its own speculation about Crown's possible motives in providing the severance benefits, and not on facts in the record. There is no evidence that Crown did anything to suggest it would reconsider its decision to terminate Aronsen, or that it would stop his severance benefits if he filed a notice of intent to sue.

The court of appeals simply raised an issue where none had existed. Aronsen never relied on the doctrine of equitable modification before the district court or the court of appeals, and he has never alleged facts to support that theory. In *Ricks*, this Court did not permit the plaintiff to change his legal theory in the midst of appellate review when his complaint failed to plead supporting facts. 449 U.S. at 257. This Court could have entertained arguments of equitable estoppel in *Ricks* and *Chardon*, but it did not. The Ninth Circuit had no basis for recognizing such an argument here.

Through its speculation about facts and *sua sponte* raising of new issues, the court of appeals has effectively drained the true meaning of *Ricks* and *Chardon*. After all, most discharged employees receive some form of post-termination benefits, and every one of them is always free to claim that he hoped his employer would reconsider the termination decision. Thus, if the Ninth Circuit's view prevails, in nearly any case where the notice of intent to sue is not filed on time, summary judgment

will not be granted because lurking in such facts will be an equitable estoppel argument. Regardless of the untimeliness of the charge of discrimination, the employer will be forced to trial.

But the purpose of limitations periods, as this Court noted in *Ricks*, is to "protect employers from the burden of defending claims from employment decisions that are long past." 449 U.S. at 256-57. The Ninth Circuit's decision in this case frustrates that purpose. Indeed, if the court of appeals' decision is permitted to stand, the short 300-day period that Congress specified for ADEA cases will be virtually eliminated.

The decision of the Ninth Circuit repudiates this Court's mandate in *Ricks* and *Chardon*. If the supremacy of this Court's rulings is to be maintained, the court of appeals' judgment must be reversed.

CONCLUSION

Under the facts of this case and the law as determined by this Court, the court of appeals' decision below cannot stand. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1982